STATE OF MICHIGAN

COURT OF APPEALS

JOHN MORALEZ, Plaintiff-Appellant,	UNPUBLISHED September 10, 2009
v MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Defendant-Appellee.	No. 279792 Ingham Circuit Court LC No. 06-000793-CD

JOHN MORALEZ, Plaintiff-Appellant,	
v MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, Defendant-Appellee.	No. 281440 Court of Claims LC No. 07-000067-MM

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

In 2003, plaintiff was laid off from his position as a television producer at defendant's public television station. He subsequently interviewed for other jobs with defendant, but was not rehired. Plaintiff thereafter brought two separate actions: (1) a circuit court action for race and national origin discrimination, and unlawful retaliation, under the Michigan Civil Rights Act ("CRA"), MCL 37.2101 *et seq.*; and (2) a Court of Claims action alleging that defendant violated his constitutional rights by terminating his employment and failing to rehire him based in part on his political activities. Both cases were assigned to the same judge, sitting as both a circuit court judge and Court of Claims judge. The trial court subsequently granted defendant's motion for summary disposition in the CRA action pursuant to MCR 2.116(C)(10), finding that there was no genuine issue of material fact that plaintiff was laid off for nondiscriminatory budgetary reasons and that plaintiff was not rehired because he was not qualified for the positions he sought. Plaintiff appeals that order as of right in Docket No. 279792. After the trial court dismissed the CRA action, it granted defendant's motion for summary disposition in the Court of Claims action

pursuant to MCR 2.116(C)(7), based on collateral estoppel and the statute of limitations. Plaintiff appeals that decision as of right in Docket No. 281440. The appeals have been consolidated for this Court's consideration, and we now affirm the appeal in Docket. No. 279792, and reverse and remand in Docket. No. 281440.[1]

I. Docket No. 279792

Plaintiff argues that the trial court erred in dismissing his CRA action because there were genuine issues of material fact regarding whether defendant discriminated against him on account of his race or national origin, or retaliated against him for pursuing a complaint of discrimination when it initially laid him off and then did not rehire him for other open positions.

This Court reviews de novo a trial court's decision to grant a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition of plaintiff 's discrimination and retaliation claims under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). A motion for summary disposition should be granted if, except with respect to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The CRA prohibits an employer from discharging or otherwise discriminating against an employee because of race or national origin. MCL 37.2202(1)(A). The CRA also provides that a person shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701(a). A prima facie case of discrimination consists of the following elements: (1) the plaintiff was a member of a protected class, (2) the plaintiff was subject to an adverse employment action, (3) the plaintiff was qualified for the position, and (4) that others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 134; 666 NW2d 186 (2003). If the defendant produces such evidence, the burden shifts back to plaintiff to show that defendant's reasons were a mere pretext for unlawful discrimination. *Id*. Important to the framework for evaluating a discrimination claim is that:

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[1] We note that two other appeals involving plaintiff's employment with defendant have recently been resolved by other panels of this Court. See *Michigan State Univ Administrative Professional Assoc v Moralez*, unpublished opinion per curiam of the Court of Appeals, decided December 16, 2008 (Docket No. 278415), and *Michigan State Univ v Moralez*, unpublished opinion per curiam of the Court of Appeals, decided April 14, 2009 (Docket No. 281588). Each of these decisions resulted from appeals from the Michigan Employment Relations Commission.

> Under either the direct evidence test or the *McDonnell Douglas* test,[2] a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision. Because a prima facie case under the *McDonnell Douglas* test creates a presumption of unlawful discrimination, causation is presumed. *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 254; 101 S Ct 1089; 67 L Ed 2d 207 (1981). A defendant may rebut the presumption of causation by articulating a legitimate, nondiscriminatory reason for the employment decision. Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision. *Price Waterhouse* [*v Hopkins*, 490 US 228, 244-245; 109 S Ct 1775; 104 L Ed 2d 268 (1989)][.] [*Sniecinski, supra* at 132-135 (footnote supplied).]

In this case, the trial court found that plaintiff established that he was a member of a protected class because of his Latin-American heritage, and that he was subjected to adverse employment actions when he was laid off from his television producer position and then not rehired for positions that were filled. He also established that similarly situated individuals outside his protected class were not targeted for layoff. However, the trial court found that defendant presented a legitimate, nondiscriminatory reason for plaintiff's layoff, i.e., that it was based on budgetary concerns, which plaintiff failed to rebut. The court additionally found that there was no genuine issue of material fact that plaintiff was not qualified for the other positions he sought.

A. Layoff from WKAR-TV

With regard to plaintiff's layoff, defendant presented evidence that it was experiencing budget problems in 2003, thereby necessitating layoffs. After determining which group could withstand the loss of positions, the employees subject for layoff were determined on the basis of seniority and dates of hire. Using that criteria, plaintiff and another employee, Corey Vowels, were both selected for layoff. Vowels grieved his layoff and, after prevailing at arbitration, was reinstated. Plaintiff also grieved his layoff, but was not successful.

Plaintiff argues that he presented direct evidence[3] that unlawful discrimination was a factor in defendant's layoff decision. Plaintiff relies on a statement allegedly made by Steve Meuche, defendant's director of broadcasting, to the effect that he was "displeased" with both plaintiff who was "Latino" and with the station's "Latino" programming, which he did not want

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[2] See *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)

[3] In cases involving direct evidence of discrimination, a plaintiff proves unlawful discrimination just as a plaintiff would prove any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). The Michigan Supreme Court has cited with approval the United States Court of Appeals for the Sixth Circuit's definition of "'direct evidence' as 'evidence, which if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Id.* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

plaintiff to be a part of anymore. We conclude the alleged statement was not direct evidence of discrimination, but a stray remark. In *Krohn v Sedgwick James of Michigan, Inc,* 244 Mich App 289, 291-292; 624 NW2d 212 (2001), this Court explained that in examining the relevancy of stray remarks in employment discrimination cases, courts are to consider the following factors: (1) whether the remarks were made by a decisionmaker or an agent uninvolved in making the challenged employment decision; (2) whether the disputed remarks were isolated or involve a pattern of biased comments; (3) whether the disputed remarks were made close in time or remote from the adverse employment action; and (4) whether the disputed comments were ambiguous or clearly indicative of discriminatory bias.

Plaintiff was laid off from his position with WKAR-TV in June 2003. The alleged comments by Meuche were made more than a year before plaintiff was laid off. Further, plaintiff has not explained or offered context for the challenged remarks. Standing alone, the remarks are ambiguous because Meuche may have merely been expressing dissatisfaction with plaintiff's performance or the station's programming. Considering the ambiguous nature of the remarks, their remoteness to plaintiff's layoff, and the absence of any pattern of biased comments, Meuche's alleged comments do not provide direct evidence of discrimination. *Krohn, supra* at 301.

Similarly, evidence that another Latin-American employee complained about her work environment does not constitute direct evidence of discrimination. None of the reasons the employee gave for her dissatisfaction at work involved any alleged ethnic or cultural bias in the workplace.[4]

The evidence plaintiff presented did not show that defendant's proffered nondiscriminatory reason for his layoff, budgetary concerns, was a mere pretext for discrimination. Plaintiff relies on evidence that, after he was laid off, defendant later resumed production of the "Latinos in Lansing" series and outsourced the production responsibilities to outside contractors. However, plaintiff's evidence does not support his contention that defendant was paying the outside contractors more than it paid plaintiff when he produced the show. First, the copy of the contract with the independent contractor does not offer a comparison of the cost of production when plaintiff produced the show. Second, plaintiff's reliance solely on his former salary as a comparison base is misplaced because it does not account for the cost of other benefits for which defendant was liable when plaintiff was an employee. Third, the evidence indicated that defendant had expanded its programming availability and was now sharing the cost of the show's production with other stations across the state. Accordingly, plaintiff's evidence does not show that defendant's proffered budgetary reason for plaintiff's layoff was a mere pretext for discrimination.

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[4] Plaintiff also relies on evidence that defendant received criticism from the Latin-American community for its lack of diversity and how it handled the "Latinos in Lansing" programming. However, the community criticism directed at WKAR-TV primarily involved programming disagreements. Ultimately, defendant did not eliminate programming for the Latin-American community, but took it in a different direction. In any event, plaintiff has not demonstrated the relevancy of community perceptions to the employment actions taken in this case.

B. Failure to Rehire

Plaintiff next argues that the trial court erred in finding that there was no genuine issue of material fact with respect to whether he was qualified for the positions that he subsequently applied for, but was not rehired. We disagree.

At the time of his layoff, plaintiff was a member of a union. The collective bargaining agreement ("CBA") between defendant and the union contains a provision governing the recall of laid off employees. Article 16 of the agreement provides:

> In the event that during a period of layoff there is a vacant position, the employee with the greatest length of service will be recalled to vacant positions first, provided he/she meets the minimum requirements and is capable of performing the duties of the position within a ninety (90) day evaluation period.
>
> An employee who meets the minimum requirements for a vacant position and who is denied the ninety (90) day evaluation period shall receive written reasons documenting why the employee was not selected for the evaluation period with a copy to the Chairperson of the Association. Upon request, the employee shall have an opportunity to meet with a representative of the Office of Human Resources to review and discuss the reasons for non-selection.

It is apparent from the plain language of Article 16 that candidates referred to hiring departments can be rejected for positions for which they might be deemed minimally qualified, as the second paragraph specifically addresses a review procedure whereby a referred candidate is not ultimately hired.[5] Accordingly, under that Article, plaintiff was entitled to first be considered for any vacancies, but was required to meet the minimum requirements for the position and be capable performing the duties within a 90-day evaluation period to be selected.

The trial court found that despite plaintiff's experience in television broadcasting, he was not qualified to perform the duties of producer and host for WKAR Radio. The evidence showed that there were significant differences between television and radio production, and that plaintiff did not have the necessary technical skills required for the radio position, specifically in digital audio production and software. Although plaintiff had some prior experience working in radio,

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[5] Even if Article 16 could be considered ambiguous as plaintiff contends, defendant submitted the affidavit of James Nash, who had worked in defendant's human resources office since 1982, and had served as its associate director of employee relations since 2004. Nash explained that Article 16 had consistently been applied over the years to allow hiring departments to make the final determination with regard to whether a recall candidate was qualified for a position and was capable of performing the position's duties within the evaluation period. Nash also averred that plaintiff 's union had never objected to this interpretation and application of Article 16. No contrary evidence was presented.

that was more than ten years earlier and according to defendant there had been significant technical advances since then. Further, the position required the employee to work independently, without close supervision, which plaintiff preferred not to do, and there was no known educational training available to prepare for the position. Thus, defendant presented evidence that it believed plaintiff would not be capable of performing the necessary duties within a 90-day period. In light of this unrebutted evidence, there was no genuine issue of material fact that plaintiff was not qualified for the radio position and would not be capable performing the duties required of the position within a 90-day evaluation period.[6]

We disagree with plaintiff's contention that evidence of defendant's discriminatory intent is apparent from a statement in a human resources record related to his interview at WKAR Radio. That record states:

> 4-2-04: Gene [Rummel] emailed [plaintiff] to inform him that he did not meet the minimum requirements for the job. Gene considers this to be the university's written response under APA Article 16. Gene did not forward Curt Gilleo's email because it included a statement about John's activity in local politics; Curt felt it would be a conflict of interest because the position would provide radio coverage of politics. (*This is a little shaky. We should have had Curt provide another written response that we could have forwarded to John describing the reasons why John didn't meet the job requirements).*

The comments in question refer to a possible conflict of interest because of plaintiff's visible involvement in local politics. This concern appears to have been removed from the response given to plaintiff because it did not strictly relate to the requirements for the position. Regardless, it does not demonstrate evidence of discrimination based on plaintiff's race or national origin.[7]

Plaintiff also argues that the candidate who was ultimately hired for the radio position was a preselection candidate, thereby indicating that defendant never actually considered plaintiff for the position. Eugene Rummel explained that a preselection candidate is someone a department selects for a position without posting the job. According to Rummel, the decision to hire the other individual for the radio position was made after plaintiff was interviewed. Because

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[6] We agree with plaintiff that the trial court erred in considering his failure to submit an audition CD as justification for defendant's decision not to offer him the position. Defendant did not cite that as a reason for not offering plaintiff the position. Upon de novo review, however, we agree that the remaining evidence established that plaintiff was not qualified for the radio position.

[7] Plaintiff's attempt to compare himself to another on-air personality to argue that defendant's alleged concern with his political activity was not genuine is unavailing. The evidence on which plaintiff relies shows that the other on-air personality admitted to having personal biases on issues, but not journalistic biases. However, defendant's concern with plaintiff was that he had personally and visibly involved himself in political matters, such as serving as a campaign spokesperson for a political candidate. There was no evidence that the other on-air personality had similarly involved himself in political matters.

plaintiff interviewed for the position and it was posted, the evidence did not show that plaintiff was passed over for a preselection candidate.

Plaintiff also argues that he established a genuine issue of material fact with regard to whether he was qualified for either of the two communications manager positions, one with the College of Communications Arts and Sciences, and the other with the College of Agriculture and Natural Resources. We disagree. Defendant's evidence established that both positions required extensive writing skills and experience, which plaintiff lacked. More importantly, both positions ultimately were not filled due to budgetary considerations and, therefore, plaintiff was not denied either position in favor of another candidate outside his protected class.

C. Retaliation

Next, plaintiff argues that dismissal of his retaliation claim was improper because he presented evidence that defendant was aware that he had filed a complaint for discrimination with the Michigan Department of Civil Rights ("MDCR"). A prima facie case of retaliation requires that the plaintiff show

> "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." [*Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Here, plaintiff's MDCR complaint was not filed until August 2004, after his layoff and after he was not selected for the radio position. Although plaintiff had not yet interviewed for the communications manager positions, as explained previously, the evidence showed that plaintiff did not possess the necessary qualifications for those positions and they were never filled by any applicant. Thus, even if defendant was aware of the MDCR complaint when plaintiff interviewed for those positions, plaintiff cannot establish a causal connection between plaintiff's MDCR complaint and defendant's failure to select plaintiff for the communications manager positions, as no one was selected for those positions.

We also reject plaintiff's argument that the trial court erred in denying his motion for reconsideration. This Court reviews a trial court's decision denying a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). Plaintiff failed to offer any new argument in support of reconsideration, or demonstrate any palpable error by which the trial court was misled. MCR 2.119(F)(3). Thus, the trial court did not abuse its discretion in denying plaintiff's motion.[8]

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[8] We find no merit to plaintiff's argument that correspondence between defense counsel and Raul Garcia is evidence of a retaliatory motive. Although evidence of an employer's disparaging
(continued…)

II. Docket No. 281440

The trial court dismissed plaintiff's claims in the companion Court of Claims case pursuant to MCR 2.116(C)(7), based on collateral estoppel and the statute of limitations. In *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995), this Court stated:

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well pleaded allegations as true and construing them in a light most favorable to the plaintiff.

The question whether a party is collaterally estopped from challenging an issue decided in a prior proceeding involves a question of law and is reviewed de novo. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996). A trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is also reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). We hold that the trial court erred in granting defendant's motion for summary disposition on the basis of collateral estoppel. As defendant appears to concede in its brief on appeal, the question whether defendant failed to hire plaintiff because of his political activities, was not "actually and necessarily determined in the prior proceeding." *Horn*, *supra* (citation and quotation omitted). See, also, *Leahy v Univ of Michigan Bd of Regents*, 215 Mich App 125, 132; 544 NW2d 692 (1996). Thus, the trial court erred in granting defendant summary disposition on that basis.[9]

With respect to the statute of limitations, in order for the period of limitations to be tolled under MCL 600.5855, a plaintiff must plead and prove that the defendant engaged in fraudulent concealment of a potential claim from the plaintiff. "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Doe v Roman Catholic Archbishop of the Archdiocese of*

(…continued)

remarks about an employee, contrary to the employer's policy, can be evidence of a retaliatory motive, *DeFlaviis*, *supra* at 442-443, the evidence here merely shows that plaintiff's name was included on a handwritten note that was included in a response by defense counsel to an inquiry about defendant's personnel policies. There was no evidence that defense counsel was involved in the employment decisions in question, and the mere listing of plaintiff's name does not demonstrate a retaliatory motive.

[9] Defendant argues that collateral estoppel applies to the order denying plaintiff's motion for sanctions as the propriety of the disclosure of the pertinent email during discovery was argued. We conclude that collateral estoppel does not apply. The issue of fraudulent concealment under MCL 600.5855 was not addressed in that motion, or at the motion hearing, as the motion only discussed alleged discovery violations.

Detroit, 264 Mich App 632, 642; 692 NW2d 398 (2004) (quotation marks and citations omitted). In this case, plaintiff has produced evidence that defendant chose not to forward him an email drafted by a person involved in filling the radio producer/host position. The email indicated that plaintiff was not recommended by the individual for the position based, in part, on a perceived conflict of interest in reporting political news when plaintiff was visibly affiliated with political figures. Instead of forwarding the email to plaintiff, defendant's human resources department sent him a new email, which indicated that he was not hired because he lacked the requisite qualifications (reasons that were also contained in the original email). No references to plaintiff's political activities and conflict of interest were included in the email.

By specifically choosing not to send plaintiff the original email stating all of the reasons he was not recommended for the radio producer/host position and, instead, drafting and sending him a different email, without any reference to his political activities and the perceived conflict of interest, defendant committed an affirmative act, concealing a possible claim or cause of action from plaintiff. See *id.* Defendant's act was "planned to prevent inquiry or escape investigation" into this particular reason for its decision not to hire plaintiff. Accordingly, defendant engaged in fraudulent concealment and the trial court erred in granting defendant summary disposition on the basis of the statute of limitations. Consequently, we reverse the trial court's order granting defendant summary disposition under MCR 2.116(C)(7) and remand for the court to determine whether defendant is entitled to summary disposition under MCR 2.116(C)(8)[10], or any other grounds properly raised by defendant.

No costs, neither party having prevailed in full.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray

[10] Defendant moved for summary disposition under both MCR 2.116(C)(7) and (C)(8), but the trial court did not render a decision under MCR 2.116(C)(8).